CF0000060360

Cr. A. 2367/97 (D)

XII-189/(Jail)
C. J. P. R. 11/94/2,000

APPEAL OF PRISONER Division Bench (Criminal)

No. 5542 Name संदीप कुमार @ बल्लू

Father's name आत्माराम ग्राम:- बलदाकछार थाना- कसडोल

Residence जिला- रायपुर (म.प्र.) Age २८ वर्ष

Sentenced to आजीवन कारावास On 15-05-97

Under section धारा- १०००/- या उक्त संक्षम धारा ३०२ भा० द० वि० by सत्रनीय अपर सत्र न्यायालय बलौदाबाजार जिला- रायपुर (म०प्र०)

S.T. No.- 486/95

It is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appellate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear within seven days he may not heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement .....

2 Date on which copy received .....

3 Date on which Appeal sent .....

4 Whether the prisoner wishes to be represented or not – Yes / No

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No. 5542 Name संदीप कुमार @ बल्लू S/o आत्माराम

Confined in केन्द्रीय Jail रायपुर (म.प्र.)

No. 336/जेल/97 Dated 8/10/1997

Forwarded to the CHIEF JUDICIAL MAGISTRATE .....

together which a copy of judgement or order passed in the case for favour of transmission to the proper Appellate Court.

संलग्न:- S.T. No.- 486/95की सत्य प्रतिलिपी

Superintendent
Superintendent,
Jail .....
Central Jail, Raipur. (M.P.)

Date of receipt in ..... office Dated 14/10/97

Date of receipt record to accompany the .....

Memo of Appeal to the Appellate court .....

No ..... Dated .....

Forwarded to the .....

Date of receipt in Appellate Court .....

High Court of Madhya Pradesh
JABALPUR
17 OCT 1997
Registration No. 72
Receipt Clerk
High Court, Jabalpur.

(29)

~~(31)~~

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No. 2367 OF 1997

Sanjeev Kumar

Vs.

State of M.P.

JUDGEMENT FOR CONSIDERATION

Sd/-
Dhirendra Mishra
Judge

HON'BLE SHRI L.C.BHADOO ,J.

Sd/-
L.C.BHADOO
Judge

7 /0 /2006

POST FOR JUDGMENT ON 08th FEBRUARY 2006

Sd/-
DHIRENDRA MISHRA
Judge

(30) (32)

DIVISION BENCH: HON'BLE SHRI L.C.BHADOO & HON'BLE SHRI DHIRENDRA MISHRA, JJ

CRIMINAL APPEAL NO.2367 of 1997

Appellant : Sanjeev Kumar

Vs.

Respondent : State of Madhya Pradesh

Shri R.K.Jain, learned counsel for the appellant.

Shri U.N.S.Deo, learned Additional Public Prosecutor with Shri Akhil Mishra, learned Panel Lawyer for the respondent/State.

JUDGMENT
(08.02.2006)

Dhirendra Mishra, J

The appellant has preferred this appeal against the impugned judgment dated 15.05.1997 passed by learned Additional Sessions Judge, Baloda Bazar in S.T.No. 486/95 whereby learned Additional Sessions Judge after holding the appellant guilty for commission of murder of Mohanlal convicted him under Section 302 of the Indian Penal Code and sentenced him to undergo life imprisonment and further to pay a fine of Rs.10,000/-, in default of payment of fine to further undergo R.I. for three years.

2. Case of the prosecution as it appears from the merg intimation of Ex.P/1 dt. 19.11.1995 and First Information Report of Ex.P/22 dt.19.11.1995 is that one Rameshar gave intimation to the police that his nephew Mohanlal Marar, aged about 19 years, who is pursuing his studies by residing in his house, went away from the house in the last evening without informing and did not return in the night. However, when he did not return in the morning also, he enquired and came to know that he had gone with the appellant and at about 8.00 a.m. he saw the dead body lying in Khairakhar under Beeja tree on the neck of which a rope was tied. The further case of the prosecution is that deceased Mohanlal had illicit relationship with the wife of the appellant and on account of this relationship, there were frequent altercations between the

appellant and his wife, as a result of which the appellant purchased liquor, obtained a glass from the house of neighbour and took the deceased on the pretext of taking liquor. Thereafter, the appellant strangulated the deceased with the help of rope and returned back to the village.

3. Learned counsel for the appellant submits that learned trial Court has held the appellant guilty on the basis of circumstantial evidence adduced by the prosecution, however, the circumstances relied upon by the prosecution have neither been established nor they are of such a nature which point towards the guilt of the accused. He further submits that these circumstances do not form the complete chain so as to arrive at the conclusion that in all probability the crime was committed by the appellant and none else and the same is based on inadmissible evidence, conjecture and surmises.

4. On the other hand, learned counsel for the State support the judgment of the trial Court.

5. We propose to proceed on the basis that the death of Mohanlal was homicidal one. We also assume that the contents of the postmortem report are correct and thus the death of Mohanlal was caused due to asphyxia.

6. There are no eyewitnesses to the alleged incident. The case of the prosecution is based on circumstantial evidence. The circumstances relied upon by the prosecution may be summarized as under;

a) That the appellant suspected the relationship of his wife Vimla Bai (P.W.18) with deceased Mohanlal and on this account he used to beat her. Khedu- father-in-law of the appellant tried to mediate.
b) That on the date of incident Shyamabai (P.W.9) had seen the deceased alive in the company of the appellant at about 5-6 p.m. in the village and on the next day in the morning at about 8.00 a.m. the dead body of Mohanlal was found in the field.
c) That Ramlal (P.W.15) on the date of incident had seen the appellant returning from Mudiyadeeh side near *nala* at about

5.00 p.m. and on the same day P.W. 16 Maheshiya saw the appellant in the dusk (sun setting) hours when he came to her house and asked for a glass for the purposes of fetching milk.

d) That the dead body of Mohanlal was found in Khairakhar under Beeja tree on the following day at about 8.00 a.m. As per postmortem report - nails were cyanosed, tongue clenched between teeth, fecal matter present in under cloth, ligature mark of the knot present round about neck, no salivation from angle of mouth, face congested swollen, abrasion over both elbows, tracheal fractured, chest greenish and dark brown coloured, lungs congested, chambers of the heart empty, undigested food found in the stomach, liver congested, bladder empty and cause of death is asphyxia due to strangulation and duration was within 48 hours from the date of examination.

e) That on the memorandum (P-7) of the appellant empty bottle of liquor was seized vide document of Ex.P/8 from the field of Baliram which is about 35-40 ft north from the place of incident. On the information of the appellant a postcard and two pieces of papers were seized from the inner packet of the pant of the deceased (Ex.P/4). The cap of the liquor bottle and *namkin* mixture spread on the floor at about 1 km. west from the place of occurrence were seized (Ex.P/9)

f) That when the appellant was medically examined by P.W.12 Dr. Y.K. Sharma on 20.11.1995 he found abrasions of size 3 c.m. below the neck and swelling of size 3x2 inch on his left posterior.

7. The prosecution in order to establish the circumstances of motive has examined P.W. 1 Rameshar, the complainant, who has stated that appellant and his wife Vimla Bai quarreled and beat each other after leveling allegations and counter-allegations. Appellant's wife and his father-in-law had called him in this respect but they did not tell him anything about suspicion. P.W. 10 Mahangu has stated that Khedu, father-in-law of the appellant came to his

house and said that Sanjeev suspects his wife. P.W. 14 Khorbahara has stated that about one month prior to the date of incident Khedu had called him and told that appellant and his daughter Vimla Bai quarreled with each other and on being asked Vimla said that appellant abused her but she did not disclose the reason. Similar is the statement of Kheduram (P.W.17)- father-in-law of the appellant who has stated that Vimla Bai has told him that Sanjeev beats her, however, she did not tell the reason for the quarrel. However, in cross-examination he has stated that he has no knowledge as to the quarrel and it is a common thing between husband and wife. Vimla Bai has stated that she knew Mohan and her husband suspected her relationship with Mohan about which she had told her father. Lastly, three papers were seized from the pocket of the deceased as per information given by the appellant which reveals the relationship between the deceased and wife of the appellant.

8. From perusal of the statements of wife of the appellant examined for the above purpose, it is evident that the appellant suspected his wife viz a viz her relationship with deceased Mohan. However, none of the witnesses examined has stated that there was any quarrel between the appellant and the deceased on account of this relationship and therefore in the absence of any strong circumstance or evidence on record regarding animosity between the two resulting in quarrel, the motive to commit murder of the deceased cannot be attributed to the appellant.

9. So far as the circumstance of last seen together of the appellant in the company of the deceased while he was alive is concerned, the prosecution has relied upon the statement of Shyama Bai (P.W.9) who has stated that she saw the deceased going with the appellant at about 5-6 p.m. in the village and at that time it was not dark and on the next day she learnt that Mohan is dead. She further stated in her cross-examination that on that day she saw the faces of Mohan and appellant for the first time. She has further stated that she knew the appellant since before. P.W. 11 Investigating Officer K.B.Divedi has stated that the house of Mahajan where the appellant and the deceased were seen together is 2-2 ½ km. away from the place of incident whereas Maheshiya (P.W.16) has stated that accused came to her house at the dusk hours and

asked for glass. Whereas Ramlal (P.W.15) has stated that he met the accused near *nala* when the accused was coming from the side of Mudiyadeeh on bicycle/foot at about 5.00 p.m. The case of the prosecution is that thereafter dead body of Mohanlal was found at about 8.00 a.m. in Khirakhar which is admittedly 2-2 ½ km. away from the place where Shyama Bai claims to have seen the appellant and the deceased as stated by the Investigating Officer (P.W.11).

10. Thus looking to the statements of Shyama Bai and Maheshiya, it can not be conclusively held that the appellant was last time seen with the deceased while he was alive because- (i) after Shyama Bai witness Maheshiya had seen the appellant alone in her house when he came to ask for a glass, further the distance of the place of incident is more than 2-2 ½ km. therefrom; (ii) none of the witnesses has stated that they saw the appellant and deceased going towards the place of incident, (iii) the dead body was found after almost 14 hours since the appellant was spotted in the company of the deceased.

11. Thus on the basis of aforesaid circumstances, the prosecution has failed to establish by credible evidence that the deceased was last seen alive in the company of the appellant near the place of incident. In this regard we are fortified in our view by the judgment of the Apex Court delivered in the matter of **Dasari Siva Prasad Reddy Vs. Public Prosecutor** reported in **AIR 2004 S.C. 4383**

12. The Court below further relying upon the recovery of empty bottle of liquor on the memorandum of the appellant had arrived at the conclusion that the appellant had strong motive to kill the deceased as he had illicit relationship with his wife Vimla Bai and he did not heed the advice rendered by Kheduram and Uttam Kumar and took the deceased, offered him liquor in excessive quantity and thereafter killed him by strangulation with the help of rope. The finding of the learned Additional Sessions Judge in this regard is based on surmises as there is no evidence to this effect that appellant administered liquor in excessive quantity and thereafter killed the deceased by

strangulation with the help of rope except that recovery of empty bottle and mixture on his memorandum (Ex.P/8 & P/9) was effected. The prosecution witnesses have categorically stated that the bottle was lying in the open place which was accessible to all. Even otherwise, from perusal of the postmortem report it is evident that the doctor has not found any sign of liquor from the stomach of the deceased. Apart from this, from perusal of the memo of Ex.P/18 of Superintendent of Police by which information was sought from the Forensic Science Laboratory on the basis of viscera of deceased Mohanlal sent in the sealed box marked as "A" and "B" whether the deceased had taken liquor or not and however, there is no report available on record either by the F.S.L. or by the Serologists to the effect that the deceased had taken liquor before the incident. Therefore, the finding of the trial Court that the appellant after administering excessive liquor to the deceased killed him by strangulation with the help of rope, is without any evidence or material available on record and the same is based on inadmissible evidence i.e. extra judicial confession made before the police.

13. The Court below has also relied upon certain letters seized vide seizure memo of Ex.P/4. However, from perusal of the record we find that no such letter/document is available on record. The circumstance in which such documents are seized is also suspicious as at the time of preparing Panchanama of Ex.P/3, no letter has been seized and P.W.21 Panchram who is witness of seizure memo has stated that the police had brought the above document from Kasdol. Even otherwise, since the documents in question has neither been exhibited nor the same has been placed on record, the Court below was not justified in referring to or relying upon those documents for drawing presumption against the appellant.

14. Now the question is whether the appellant can be held guilty on the basis of injuries present on his person. Though the trial Court has not relied upon that circumstance but even then this circumstance is there on record regarding presence of injuries over the person of the appellant as found by the doctor.

15. Though on the basis of only this circumstance the appellant cannot be held guilty of the above offence, even then the appellant has stated in his statement under Section 313 of the Code of Criminal Procedure that the villager called him through Ramprasad and on his denial he was beaten by the villagers. P.W. 5 Maheshram in paragraph-5 of his statement has stated that it is true that villagers after calling the accused on the place of incident were harassing him and it is also true that he had slapped the accused and that thereafter police reached the village. Thus the injuries, if any, on the person of accused stands explained and on the basis of this circumstance it cannot be held that the appellant sustained injuries during struggle while strangulating the deceased.

16. P.W. 3 Manharan- Sarpanch of the village, has stated in paragraph-2 of his deposition that on enquiry he found that Ramprasad and Sanjeev are the friends of Mohanlal whereupon he further enquired from Ramprasad and came to know that he had gone to Achanakmar whereas the appellant was present on the spot. However, thereafter Ramprasad was called and asked, he also denied his involvement in the crime.

17. Thus from the statement of this witness who is Sarpanch of the village it appears that initially villagers suspected the appellant as well as Ramprasad also. It also appears from the statement of accused that villagers called him through Ramprasad to the place of occurrence, however, statement of Ramprasad is missing and therefore, in the above circumstances, it cannot be conclusively held that the circumstances relied upon by the prosecution and evidence adduced to establish those circumstances unerringly point towards the appellant alone.

18. It is a settled law as held by the Hon'ble Apex Court in plethora of judgments that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

19. Thus having regard to the entire facts and circumstances of the case and evidence available on record, we are convinced that the prosecution has miserably failed to build up any chain of circumstances which in its totality would point out the guilt of the appellant and considering this aspect alone, we are of the considered opinion that the learned Additional Sessions Judge totally misdirected himself in the matter of appreciation of evidence and this wrong appreciation of evidence led to him to hold that the appellant was guilty of murder of Mohanlal, therefore, we are not in agreement with the view of learned Additional Sessions Judge and in the aforesaid circumstances, the appellant was entitled for benefit of doubt.

20. We have examined each circumstance relied upon by the prosecution against the accused/appellant assuming that the opinion expressed in the postmortem report is correct and cause of death of deceased Mohanlal was asphyxia due to strangulation and as such homicidal. However, distinction between death due to strangulation and death due to hanging is very fine and from perusal of the postmortem report, we are constrained to observe that the doctor performing autopsy has done his job very casually without making any

sincere efforts to detail and record the symptoms, postmortem appearance such as – external appearance, internal appearance in minute detail and has based his findings solely on the ground that saliva was not dribbling out of the corner of mouth, chin and chest and therefore, he has ruled out the possibility of death due to hanging. Moreover, other symptoms which distinguish the death due to hanging and strangulation such as – stretching of neck, bleeding from nose, mouth and ears, position of ligature marks, its size, scratches, abrasion, finger nail marks and bruises on the face, neck and other parts of the body have neither been mentioned nor been considered. On the contrary, in the cross-examination he has admitted that he has not described the various dimensions of the rope and its knot in his report. He has also admitted non-mentioning of material of rope, part of the neck on which knot was tied and whether the knot was shifting type or constant type as ligature was formed on the basis of above. He has also not photographed the knot, dead body and he has not weighed the dead body as the same was relevant for the purposes of ligature marks. He has also admitted that he did not examine whether cartic artillery was ruptured or not.

21. It is a settled law that suspicion, howsoever, grave may be, cannot take place of proof as there is a long distance between "may be" and "must be" and presumption of innocence is available to the accused. Reliance is placed on the judgment of the Hon'ble Supreme Court reported in **(2004) 10 SCC 699** in the matter of **Narendra Singh and another Vs. State of M.P.** in this regard.

22. Thus in view of the aforesaid discussions and having regard to the evidence available on record, we are of the considered opinion that the judgment of conviction and order of sentence passed by the learned Additional Sessions Judge against the appellant cannot be sustained and the same is liable to be set aside.

23. In the result, appeal succeeds. The appellant is acquitted of the charge leveled against him and he is directed to be set at liberty forthwith if not required in connection with any other offence.

Sd/-
L.C.BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge